Office-Supreme Court, U.S.
FILED
AUG 31 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 507

DONALD P. KAHN, *Petitioner*

v.

JACQUES H. FOX, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

THURMAN ARNOLD
1229-19th Street, N. W.
Washington, D. C. 20036

RICHARD L. RAYMOND
334 West Front Street
Media, Pennsylvania 19063

Attorneys for Petitioner

Of Counsel:

ARNOLD & PORTER
1229-19th Street, N. W.
Washington, D. C. 20036

SCHROEDER & RAYMOND
334 West Front Street
Media, Pennsylvania 19063

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	11
The Second Question Presented	15
Appendix A	1a

CITATIONS

CASES:

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 2, 12, 13
Henry v. *Collins*, 380 U.S. 356 (1965) 2, 12, 13
Linn v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966) 2, 3, 11, 15, 16
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 2, 11, 12, 14, 15

CONSTITUTION AND STATUTES:

United States Constitution, First Amendment 2
United States Constitution, Fourteenth Amendment .. 2
28 U.S.C. § 1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

DONALD P. KAHN, *Petitioner*

v.

JACQUES H. FOX, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Petitioner, Donald P. Kahn, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District, entered in the above entitled case.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Pennsylvania, Eastern District, are unreported and are printed herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania, Eastern District, sought to be reviewed was entered on June 24, 1966. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The decision of the court below sustains a judgment for slander of a public official which violates the Fourteenth and First Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

The sole issue decided by the court below was based on federal law. It involved the interpretation of the decisions of this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), *Henry* v. *Collins,* 380 U.S. 356 (1965), and *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53 (1966).

The broad question presented is whether under those cases the decision holding petitioner liable for malicious slander of a public official violates the Fourteenth and First Amendments to the Constitution of the United States on the ground that the record contains no evidence of malice as defined by the Supreme Court in cases involving public criticism of official conduct.

More particularly the case involves the following subsidiary questions:

1. Where a speaker criticizes the conduct of a public official in an extemporaneous speech before a hostile audience after thoroughly investigating the facts on which the criticism was based, and where the record shows no evidence of any personal malice, may the public officer recover damages for malicious slander

on the basis of a single inadvertent misstatement in that speech, solely on the ground that the speaker knew prior to the meeting that this single detail in his criticism was untrue?

2. Is the ruling in the recent case of *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53 (1966), that in a suit for libel or slander of a *labor official* arising out of a labor dispute special damages must be shown, applicable to the case of a suit for libel or slander based on criticism of a *public official?*

STATEMENT OF THE CASE

Respondent, Jacques H. Fox, District Attorney for Delaware County, Pennsylvania (hereinafter called the District Attorney), brought suit for slander against petitioner and recovered judgment for $12,500.00. This judgment was affirmed by the Supreme Court of Pennsylvania on June 24, 1966.

Petitioner had made an extemporaneous speech at a public meeting criticizing the official conduct of the District Attorney in a prosecution for murder. The speech was made under great difficulty and excitement, before a hostile audience, subject to constant interruption from the chairman, who tried to prevent the speaker from continuing. The principal charges and main body of the criticism were based on reliable information obtained by the petitioner and are not made a basis for recovery in this action. Respondent's cause of action below rests solely on a single sentence in that speech, which petitioner denied saying, but which the jury found on conflicting evidence he had said. The evidence of malice consists of petitioner's own testimony in which he tried to persuade the jury he had not made the misstatement on which the slander

was based. Petitioner said in effect that it was impossible for him to have made such a statement in his extemporaneous speech because he knew prior to the meeting that it was not true.

In more detail the circumstances were as follows:

Early in 1961 a young girl was murdered in Delaware County, Pennsylvania. It was a cause celebre. A suspect named Kessleski was arrested by the state police. He confessed to the murder and was arraigned on April 4, 1961. Four or five days later Garland D. Cherry, who at that time was attorney for Kessleski,[1] brought a writ of habeas corpus charging that the confession was obtained by force. (R. 131a, Ex. 6) Petitioner, a newspaper reporter, became interested in the case. He arranged a meeting with Cherry. Cherry told petitioner that a State Trooper had taken Kessleski into a room and obtained a confession by beating him with a telephone book. Cherry asked petitioner to obtain newspaper coverage for this story. (R. 132a-138a)

Kessleski was held in jail without bond for two and one-half months until the hearing on habeas corpus. As a result of the habeas corpus hearing Kessleski, though charged with murder in the first degree, was admitted to bail in the sum of only $1,500.00. (R. 138a) After that the District Attorney made no attempt to bring Kessleski to trial. Petitioner believed that the District Attorney was using a confession which he knew was coerced to hold Kessleski under indictment for murder in a case that ought to have been dismissed for lack of evidence. On November 1, 1961,

---

[1] In these proceedings for slander he has been attorney for the District Attorney and also an important witness for petitioner.

after the case against Kessleski was still undisposed of, seven months since the arraignment, petitioner who was a candidate for Justice of the Peace was invited along with other candidates to address a political meeting. He decided to use that opportunity to speak in order to expose and criticize what he considered to be improper conduct on the part of the District Attorney. He testified: (R. 139a-140a)

> Now different things strike different people different ways. It just so happened that this thing, because I knew a little more about it than most people would, and interested myself more in it than the ordinary person would perhaps, that I had a feeling, well, that it was a terrible thing that was happening, a terrible thing, being held under bond, not in jail but under bond, and under indictment for longer than it should have taken for it to be decided that he did not belong there. And it seemed to me that something should be said about it, if I had the opportunity to say something about it I would say something about it. And I knew that I would have this opportunity on the 1st of November, . . .

About one hundred and fifty people attended the meeting. (R. 56a) Among them was the District Attorney. (R. 105a-106a) When petitioner's turn came to speak he began by saying that the duties of a Justice of the Peace were simple and that his own qualifications were unimportant. The important issue was the proper administration of justice. Then to the surprise of everyone he went on to attack the District Attorney's conduct in the Kessleski case. Petitioner's words threw the meeting into turmoil. The moderator tried to stop petitioner from speaking. He interrupted him several times. (R. 85a-87a) Petitioner continued

under great difficulty. The audience was indignant at the attack on the District Attorney. (R. 88a)

The general substance of petitioner's criticism of the conduct of the District Attorney was unquestionably based on facts or reliable information obtained from Cherry who had represented Kessleski in the criminal prosecution. Petitioner charged that the prosecution was based on a confession obtained by force, that Kessleski had been held in jail for two and a half months and the District Attorney had failed to bring the case to trial for seven months. All this is true. (R. 20a, 138a) That the District Attorney had no evidence against Kessleski is corroborated by the fact that he later nolle prossed the Kessleski indictment. The District Attorney admitted on cross-examination that he had no evidence against Kessleski. (R. 112a-114a)

It is thus clear from the record that petitioner had ample and legitimate grounds for critizing the official conduct of the District Attorney. The District Attorney's entire cause of action was based not on petitioner's general criticism, but on a single sentence which some of the witnesses testified they heard petitioner say in spite of the confusion of the meeting. Other witnesses could not remember that petitioner had made this particular statement. The only alleged slander reads as follows: (R. 162a)

> We had a murder down here in Trainer and the District Attorney picked up a young weak-minded fellow and got a confession out of him; it was a simple way he got it, *he* put him in a room by himself and beat it out of him with a telephone book. (emphasis supplied)

Petitioner denied making any statement charging the District Attorney with personal assault on Kessleski. His recollection of what he had said was: (R. 141a)

> Now to reconstruct for you just exactly what I said, I said, Now the District Attorney picked up this poor kid, had him picked up, and he solved his case, and how did he solve it? The easy way. He put this poor kid all by himself in a room *with a big State cop who belted him* one directly across the head, and that solved the case. (emphasis supplied)

The jury decided the issue as to the exact words used by petitioner in his extemporaneous speech in favor of the District Attorney's version.

Accepting the jury's somewhat doubtful verdict of malicious slander, the sole issue is whether the record contains any evidence that the alleged slander was maliciously uttered within the principles recently laid down by this Court.

The record does not contain a scintilla of evidence that petitioner has any hostile feelings toward the District Attorney or sinister motive in making the speech. In spite of this the trial court did instruct the jury that they might infer a sinister motive from a letter written for publication the same night immediately after the meeting was over, in which petitioner reviewed the substance of his speech. A paragraph of that letter reads as follows: (R. 19a-20a)

> From his (the District Attorney's) chosen clay pigeon, Alfie Kessleski, he (the District Attorney) *had* a confession extorted by physical beating. He then sat Kessleski in jail for three months, without bail; but when time came to go on trial last June he found he didn't like his case

so much after all and got a postponement till fall. He was forced to let his "murderer" out on the low, low bail of $1,500 . . . another continuance, till January. I hope that sooner or later he will either try the case or give Kessleski back his good name by dropping the charges. (emphasis supplied)

This paragraph is a contemporaneous memorandum of what petitioner thought he said at the meeting, and almost conclusive proof of what he intended to say. It is factually correct. Yet respondent's counsel attempted to use it as evidence of a sinister motive because petitioner omitted to mention that it was a State Trooper who had beat Kessleski. He asked: (R. 148a-150a)

Q. Now, Mr. Kahn, why did you fail to mention a State Trooper in your letter to the Times?

A. Because the form of the discourse did not appear to me to require it. I was talking in my speech about somebody doing something to somebody. In the letter I was speaking of the quality of a confession. I did not think it necessary to drag in a State Trooper, certainly not by name. A policeman's lot, you know.

* * * *

Q. You had no beef with this man (the State Trooper) who may have gotten carried away, you did not want to use his name; is that what you say?

* * * *

A. I wasn't interested in him, that is why.

* * * *

Q. . . . Did he have a confession extorted from Mr. Kessleski by a physical beating?

A. He had a confession, and it had been extorted by physical beating.

Q. In other words, what you are saying to the jury is that if that confession was a piece of paper,

> whoever is holding it in their hand at the time you are writing you could very properly say he had a confession extorted by physical beating. Is that the construction you want this jury to take from what you wrote?

On the basis of this extraordinary cross-examination[2] the court instructed the jury that they could find petitioner had a sinister motive in making the misstatement which the jury found he made, because when he correctly stated the facts to the newspaper he did not mention the State Trooper. The court said: (R. 164a)

> And you may recall that he was asked on cross-examination whether he did not in fact know that it was a State Trooper who had beaten the boy and therefore why did he not use the State Trooper's name in this letter which he wrote to the Chester Times . . . And you may recall his answer in which he said, this is quoting his exact words, I had no beef against the State Trooper.
>
> And therefore you may ask yourselves, members of the jury, as bearing on the credibility of the witness, did he have a beef against someone else? *And did he or did he not exercise that beef by slandering the plaintiff in this case?* (emphasis supplied)

Apart from this attempt to imply a sinister motive from the fact that in a contemporaneous letter which correctly stated the facts the petitioner did not go further and affirmatively state who had administered

---

[2] The entire cross-examination, by means of which counsel for respondent attempted to create the inference of a sinister motive because petitioner did not in his contemporaneous letter mention the fact that it was a State Trooper who had assaulted Kessleski, appears on 142a-155a of the Record.

the beating to Kessleski, the record contains absolutely no evidence even of hostility on the part of the petitioner toward the District Attorney. Respondent made no attempt to prove that the misstatement with regard to the District Attorney's personal assault on Kessleski was intentionally made. The great preponderance of the evidence shows that if it was made at all it was made negligently or inadvertently. In this situation the court instructed the jury as follows: (R. 160a)

> I instruct you therefore that you the jury have a two-fold duty before you can award any damages to the plaintiff. First you must find that this defendant did make a defamatory utterance about the plaintiff Mr. Fox. And secondly you must be satisfied of the existence of malice on the part of the defendant.
>
> Now if a false statement is uttered not with the honest desire of informing the public, but for another and sinister motive and without an honest desire to impart information, you may find malice. In other words, you may find malice if you find that a defamatory statement was uttered with reckless disregard of whether it was false or not or was uttered with actual knowledge of its falsity.

This instruction made in the context of the present record permits the jury to infer malice with respect to a single misstatement in an extemporaneous speech solely on the ground that the misstatement was inconsistent with information the defendant had prior to making the speech. It permits a public official to recover for malicious defamation even in a case where the record shows that the extemporaneous misstatement if made was in all probability a result of negligence or inadvertence.

In other words, a negligent or inadvertent error in an extemporaneous speech is sufficient to make the speaker liable for malicious slander of a public official.

The jury returned a general verdict which included punitive damages. There was no showing whatever of specific damage as required by the decision in *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53 (1966), as a prerequisite to recovery of punitive damages in a case involving defamation of a public official.

REASONS FOR GRANTING THE WRIT

If this case is not reversed criticism of a public official in an extemporaneous speech will become hazardous indeed. Few people as every lawyer knows are capable of extemporaneously reciting the facts of a complicated situation and having all these statements accurate and consistent with their previous information and knowledge. Inadvertent errors are bound to occur. The more inexperienced the speaker, the more errors he is likely to make. The more stormy the meeting the greater difficulty there will be to determine what the speaker actually said.

Yet the decision below not only subjects the speaker to the hazard of a jury finding that he said something which he actually did not say; it goes further and permits the jury to find that the speaker's error was a deliberate lie on the sole ground that it was inconsistent with his previous information. And this result is permitted if the speaker makes a single error in an extemporaneous speech, the major part of which is based on reliable information.

It is true that in the *New York Times Co.* v. *Sullivan* opinion, 376 U.S. 254, 279-280 (1964), this Court used the following language:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, *with knowledge that it was false or with reckless disregard of whether it was false or not.* (emphasis supplied)

The instruction of the trial court in the case at bar quotes part of this language.[3] But the opinion of this Court obviously means that the speaker *at the time of utterance* knew that he was making a false statement. It does not mean that a misstatement of fact in an extemporaneous speech can be the basis of a finding of malice solely on proof that it was contrary to the speaker's information and knowledge *prior to making the speech.*

As the dissenting judge points out in his opinion below, the instruction of the court enables a jury to find malice in a case where the defendant was only negligent.

The opinion of the court below is in direct conflict with the opinions in *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), and *Henry* v. *Collins,* 380 U.S. 356 (1965), which interpret the *New York Times Co.* decision. In *Garrison* this Court held that in order to constitute malice in defamation of a public official there must be affirmative proof that defendant was guilty of a "calculated falsehood",—a "lie, knowingly and deliberately published about a public official". (379 U.S. 64, 75

---

[3] In other words, you may find malice if you find that a defamatory statement was uttered with reckless disregard of whether it was false or not or was uttered with actual knowledge of its falsity. (R. 160a)

(1964)). In *Collins* this Court held that a speaker must have an "intent to inflict harm *through falsehood*". (380 U.S. 356, 357 (1965)). (emphasis added)

Both of these cases present situations where the criticism of a public official was extreme and reckless from the point of view of an ordinary prudent man. In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), the defendant in a press conference had accused eight named judges of being under the influence of racketeers. There was no reasonable ground for a prudent man to believe in such a statement. The trial court considered such an accusation reckless. It said:

> It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges . . . were guilty of what he charged them with . . ." *Garrison* v. *Louisiana,* 379 U.S. 64, 78 (1964).

This Court reversed, saying:

> This is not a holding applying the New York Times test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinarily prudent man might be able to assign a just and fair reason for" . . . The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth. (*Id.* at 79)

The decision of the Supreme Court of Pennsylvania is flatly at variance with this teaching that "defeasance of the privilege" can be conditioned only on "reckless disregard for the truth". For the trial court

permitted, and the Supreme Court of Pennsylvania sanctioned, the jury's finding of malice, defeasing the privilege, from the simple fact that the petitioner physically uttered words which he knew, prior to making the statement, were not true. Where, as here, in the context of an extemporaneous speech, there is an issue raised as to whether the defendant meant to say the words he physically said, the giving of such an instruction permits the jury to find for the plaintiff public official without finding the requisite mental element on the part of the defendant on which this Court's decisions insist—"reckless disregard for the truth".

In the case at bar the most prudent man would have had difficulty under the conditions of this extemporaneous speech in avoiding the error which petitioner made. The record shows that if petitioner made the misstatement the jury found, he did not intend to do so. Indeed, he testified that he was sure that he could not have made it because he knew beforehand that it was not true. Certainly no inference can be drawn from petitioner's prior knowledge that when he made a mistake in an extemporaneous speech he was deliberately and intentionally lying.

Apart from this detailed analysis, the decision below is in direct conflict with the broad purpose of the decision in *New York Times Co.* v. *Sullivan* to remove the hazard of libel from criticism of public officers except in cases of outrageous abuse of that privilege. As this Court said in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 281 (1964), (quoting with approval from the Supreme Court of Kansas):

> [I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance

> to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small, that such discussion must be privileged.

The issue raised in the case at bar is of public importance. If certiorari is denied lower courts in Pennsylvania will be compelled, and other lower courts may be persuaded, to follow the Pennsylvania opinion. No one who makes extemporaneous criticism of a public official will be safe from penalties if, as is inevitable in such situations, he makes any single mistake inconsistent with his previous knowledge. And furthermore, in a case where testimony conflicts as to what the speaker said, a jury verdict against him on such conflicting evidence will make him liable even if as a matter of fact he never made the mistake.

To sum up, so far as extemporaneous speeches are concerned, the decision below relegates the law of slander of public officials to what it was prior to the recent Supreme Court decisions on that issue.

The Second Question Presented

The second question presented by this record is whether the opinion in *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966), is applicable to this case. *Linn* involved a suit for defamation brought by an employer against a union in connection with a labor dispute. Applying the *New York Times Co.* rule this Court held that plaintiff must prove

specific injury such as general injury to reputation, consequent mental suffering, alienation of associates, and specific items of pecuniary loss before it could recover punitive damages. In this case there was no proof of special injury to the respondent.

The majority opinion in the court below held that the *Linn* case was inapplicable in the case of a suit for defamation of a public official as distinguished from an employer or labor official.

Petitioner contends that this ruling of the majority was in error and that the following excerpt from the dissenting opinion of Judge Cohen represents the correct interpretation of *Linn*:

> By finding *Linn* inapplicable in the present context, the majority is saying that more redress for defamation must be allowed in the area of a political campaign than in the context of a labor dispute. Yet, in *Linn*, the Court quoted *New York Times* as to the policy involved: "[C]ases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" 383 U.S. at . Thus, the Court recognized that the policy of encouraging free speech is as great in politics as in labor. I personally feel that a much larger area of un-

restrained comment is permissible in a political campaign.

Respectfully submitted,

THURMAN ARNOLD
1229-19th Street, N. W.
Washington, D. C. 20036

RICHARD L. RAYMOND
334 West Front Street
Media, Pennsylvania 19063

Attorneys for Petitioner

Of Counsel:

ARNOLD & PORTER
1229-19th Street, N. W.
Washington, D. C. 20036

SCHROEDER & RAYMOND
334 West Front Street
Media, Pennsylvania 19063